IMLA 2011 Annual Conference
Chicago, Illinois
September 10 - 14, 2011
Institute for Local Government Lawyers

Work Session XIII. Personnel & Employment Law

A Top Ten List of Things a Municipal Employment Lawyer Doesn't Want to Hear – And What to Do About Them

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Not so many years ago, a television advertisement featured an auto mechanic in the midst of making extensive repairs to an automobile. In an apparent admonition to purchase a particular brand of oil filter and replace it on a regular basis as a form of preventive maintenance, the mechanic says, "You can call me now, or you can call me later!"

Notwithstanding the good intentions of a lawyer who seeks to engage in preventive guidance with a client, that lawyer likely has had the same reaction when a client calls seeking "help" after an incident occurs. For municipal lawyers who practice employment law – and particularly those whose general representation does not focus on employment law – these types of communications, unfortunately, are not rare occurrences.

1. ***"You remember that sexual harassment training that we talked about doing; well, I guess we actually should have done it."***

Any number of variations of common adages may apply to this situation:

- The road to litigation is paved with good intentions.
- You can advise a client but you can't make the client follow that advice.

Of course, as with all the topics discussed in this work session, an ounce of prevention is worth well more than a pound of cure. It is worth keeping in mind that advice generally will be useful only if it is followed. Hence, a key element of preventive maintenance is to follow up with clients on occasion, particularly in areas where training is recommended.

Here, in this scenario, however, that follow-up did not occur, so the municipality did not provide the training. What then can be done to minimize potential liability arising from the apparent harassment instance that has occurred?

First, it is well to remember that employer liability for sexual harassment generally is not strict liability, but is imposed when the employer knew or should have known that harassment was occurring.[1] The major exception is where the harassment is by a

[1] Comments here primarily address sexual harassment as a form of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. States generally have similar or more specific sexual

supervisor and involves tangible employment consequences. If the harassment can be found to have been unexpected and might have occurred even if training were to have been provided, employer liability may be avoided – though the costs of defense likely will be incurred.

Therefore, a prudent response will be to take prompt and effective action in answer to the complaint, which does not involve hoping that the complaint will go away. If harassment did occur, a formal complaint may be avoided if the complainant can recognize the employer truly is seeking to address the issue promptly and effectively. Of course, this does not mean that the alleged perpetrator is assumed to be guilty; but, the municipality should undertake a prompt and meaningful investigation pursuant to its sexual harassment policy. [If the municipality does not have a sexual harassment policy in place at the time of the incident, the likelihood of successful defense is lessened by several magnitudes.]

If the investigation finds that harassment did occur, discipline should be imposed, as appropriate. A further possibly effective defense may be to ensure that training is instituted promptly– and consideration may be given to involving the complainant in the planning (and perhaps delivery) of the training.

Another key defensive action is to ensure that retaliation does not occur against either the complainant or a person who may cooperate in the investigation. [See *Crawford, supra*, n. 1. and statement # 4, *infra*.]

2. ***"I know I should have called you sooner, but we really needed to have done something about that . . . (person or situation)!"***

If patience is a virtue, then it seems that local government officials and employees with the power to hire and fire must not be very virtuous. Virtue aside, clients do act without prior consultation with their attorney and terminations without "clearing it with counsel" obviously do occur.

Once again, an ounce of preventive medicine applied in advance is helpful. Perhaps a checklist of procedures to follow can help (one for at-will employees and a separate one when "cause" is required or when free discretion is limited). Pre-termination guidance also might include special procedures to ensure that an employee in a protected classification cannot assert a viable violation (e.g., demonstrate improper discrimination). The termination "kit" also should include a step-by-step guide to ensure that state statutes regarding termination pay are followed. Another component of meaningful guidance

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harassment laws. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 553 U.S. __, 129 S.Ct. 846 (January 26, 2009).

could include advice on comments to terminated employees, issues associated with references, and personnel records and files.

When the phone call or email cited in this example is received by the municipal attorney, there are some steps that should be taken in response, aside from a lecture on the virtues of pre-termination consultation and the basics of who, what, when, where, and why.

- Ascertain if the employee is in a protected classification.
    - In the case of an employee covered by the Age Discrimination in Employment Act or the Older Workers Benefit Protection Act, ensure that time periods are provided for execution of documents, consultation with counsel, and rescission of waivers of liability.
    - Compile documents and other evidence to demonstrate that the reasons leading to termination are not based on prohibited criteria.
    - Review with the human resources coordinator the actions required upon termination, including requirements for paying wages and monetary payments for accrued benefits, if applicable.

- Review employee time sheets to protect against a claim of failure to comply with the Fair Labor Standards Act and overtime payment in particular.[2]

3. "*You didn't really mean to say that we had to keep all medical files separate from the other personnel files, did you?"*

Failure to keep medical information separate from other personnel files may not arise to a statutory violation (at least of federal law such as HIPAA[3]) or a violation of an employee's right of privacy[4]), as the primary problem lies not in separation but disclosure or improper use of such information. [State law, of course, may impose requirements that more directly relate to separation requirements.]

In the scenario presented by this statement, though, it is unlikely that the caller has contacted municipal counsel solely because a separate medical information file was not maintained. In a lucky situation where no disclosure or use of the information has occurred, a "Nike"© response may be sufficient with regard to properly maintaining medical information – i.e., "Just do it!"

In the more likely scenario (that there is a reason for the contact involving disclosure or use), a first response may be to determine if the medical information is protected health

[2] Recently in New Hampshire, a municipality filed suit against a police officer, who had resigned, seeking to recover training costs that the employee contractually agreed to repay if he voluntarily left employment prior to a stated time period. The officer countersued asserting that he had not been paid overtime in accordance with the FLSA.
[3] *Health Insurance Portability and Accountability Act (HIPAA) of 1996* and the Privacy Rule in particular.
[4] See also discussion under statement #8, *infra.*

information or some other personal information, disclosure of which may not have been prudent but might not arise to a violation. If that fortuitous circumstance does not arise, then the next query asks if disclosure occurred and, if so, to whom. Mere recall of the information will not necessarily cure the breach, but prompt action must be taken to prevent further disclosure.

If the information has been used improperly (e.g., a termination or failure to hire or promote based on medical condition without justification), the next call may well be made to the municipality's insurance carrier.

In any case, though, mitigation might take the form of:

- Preventing further disclosure or improper use;
- Very prompt implementation of preventive measures;
- Undoing any wrongful actions to the extent possible; and
- Assurance to affected individuals of corrective and remedial actions.

4. ***"They can't prove we retaliated!"***

The words in this statement suggest that "they" (whoever they are) indeed may be able to prove retaliation. In that regard, this municipality will not be alone, as the EEOC reports that over half of its current case load includes retaliation complaints.[5] Being in the company of others does not mitigate damages or make retaliation acceptable or without consequences.

Here, an initial difficulty may lie in extracting an accurate depiction of what occurred, when it occurred, how it happened, and why it occurred. One initial defense may be dispensed with at the outset. That is, the caller may base the statement on the fact that no factual basis existed for the initial complaint of harassment or discrimination. Since retaliation may exist even in the absence of an initial improper act, the lack of a culpable act preceding retaliation is largely, if not completely, irrelevant.

In addition to investigation and examination for retaliation under a specific statute (e.g., Title VII or the ADEA), practitioners must consider the possibility of violation of state whistleblower statutes. Though defenses and statutes of limitations may create a bar to some federal retaliation complaints, state anti-discrimination and whistleblower laws may be more "plaintiff-favorable" in terms of both causes of action and times within which to file complaints.

Further, some of the defenses available in a base discrimination or harassment case may not apply. For example, the defense that adverse employment action would have

[5] For EEOC comments on retaliation in general, see http://www.eeoc.gov/laws/types/facts-retal.cfm.

occurred even in the absence of a prohibited act may not be available when the complaint involves retaliation.
On the minimal positive side, retaliation involves intent, so the "legal" burden of proof requires more than an allegation. In reality, though, circumstances that accompany retaliation often may be demonstrated without much difficulty, and the fact finder has a degree of latitude in making "connections."

Aside from being able to demonstrate that retaliation was not a motive for an action (and it is always hard to prove a negative, even in a burden-shifting framework), an investigative response to the caller's statement should involve a careful review of the circumstances and include candid conversations with parties and witnesses. [Naturally, counsel must consider the advisability of conducting this inquiry personally to avoid possible disqualification from representing the municipality in administrative proceedings or litigation.]

A practical response to this call is to treat anything that is said from this point on with a fair amount of skepticism. In turn, justification and negative comments about the complainant might be viewed at something less than face value.

5. "***He complains about everything and threatens to file a claim every time he gets a little ticked off."***

Experience suggests that the first response to this statement is to consider why this "jerk" is still employed. Chronic complainers are not seen as lending to a productive work environment. If "cause" is required to terminate such an employee, there, indeed, may be an insufficient basis to have taken action earlier. In that situation, inquiry might focus on whether the personnel file contains notations of unsatisfactory performance, including adverse impact of the employee's conduct. Reality once again may intrude, and there will be no such notation in the personnel file. This does not necessarily mean that an employee's history is irrelevant. A wary eye will watch out for personnel file comments about past incidents that were only recently noted in the file.

Similarly, even when the employee is "at-will," the question may arise as to why the discipline occurs now and not following earlier adverse conduct.

Statements made by employees, whether in the private or public sector, that constitute mere "griping" generally do not rise the level of protected speech, as discussed more fully under statement #7. Employers must be wary, though, of seeking to discipline employees for comments that concern legitimate and substantive issues (public sector protections arising under the First Amendment) or that discuss working terms and conditions (private sector protections arising under the National Labor Relations Act or state legislation).

This inquiry focuses, naturally, on pretext. Conduct that has been acceptable – or at least has not served as the basis for an employment action – suddenly requires that the employee be disciplined or terminated. In an all-too-familiar situation, the discipline coincides with the employee engaging in some form of protected conduct. The question then arises as to what the real precipitating factor underlying the employment action may be.[6]

In one case that had a fortunate conclusion, an employer's decision to terminate an employee was made in early December but its implementation was postponed until after the holidays. Budget deliberations then took up the board's time and the decision was not communicated to the employee until after he had complained that a board member was conducting an unpermitted operation. Notwithstanding the board's protestations that there was no connection, formal minutes documenting the early December decision had not been kept. Fortunately, a tape recording of that meeting had been saved and was admitted into evidence in the ensuing whistleblower proceeding and the employer prevailed.

Timely record-keeping of employer actions and documentation of both formal reviews and informal views of employee conduct may be helpful in a case such as under consideration. Perhaps even more useful is the conveyance of employer perceptions of an employee to that employee, thus eliminating the "'I never knew I was doing anything wrong" defense." Decision-makers in contested cases can be expected to react negatively when an employee asserts no knowledge that performance or attitude was problematic. An employer merely saying that comments were made is not terribly useful or helpful in the absence of a formal notation in the personnel file.

It has been said that "oral reprimands" as the first step in a progressive disciplinary policy should not be noted in a personnel file, to which a proper answer is "hooey." Similarly, provisions in personnel policies, collective bargaining agreements, or other documents calling for disciplinary records to be expunged after a period of good behavior seek to alter history. One defense to those who assert that anti-expunging provisions deter employee improvement is to note that the personnel file for an employee who does not repeat an infraction would then be a positive, not a negative.

Aside from record-keeping and documentation, the key fact in most cases such as the statement here will be the answer to "why now?" Proper inquiry to advise the municipality (in advance of the employment action, if possible) must disclose the real basis for action. If the personnel file does not disclose a basis for action premised on notice and opportunity to cure problems (particularly when cause is required – but even to support the minimal "process that is due" in at-will situations), a prudent path may

[6] There is no sure way to prevent an employee from claiming pretext in any case involving discipline or termination. Diligent, timely and factual recordkeeping contemporaneous with events and decisions can be of great assistance. Another preventive tool is timely and documented notice to employees of unacceptable conduct.

involve patience. If the employee truly is a chronic complainer without justification, the conduct likely will be repeated after notice is given and then a personnel action may be easier to defend.

6. The Mayor just wanted to take a look at that personnel file. I figured it wouldn't hurt."

Most local officials seem to sense an entitlement to peruse any records on file in a local government office, often including the personnel files of employees. In a "benign" instance, access to employee personnel files would be routine (at least in some of the smaller communities that this author has represented). Larger communities will have human resources departments where personnel files are maintained and likely have policies in place to govern access to personal information about employees. Of course, academic discussion is easier that actually telling an elected local official to keep hands off records that are available only on a need-to-know basis.

It, also, is difficult to conclude that an official charged with responsibility for the overall governance of a municipality should not have access to employee files, at least those that contain objective information that is not otherwise restricted. However, a phone call such as the one posited here may well have come about due to that personnel file containing information that should have been kept in a separate "for certain eyes only" file. A primary example would be private personal health information (PHI). The so-called HIPAA privacy rule may or may not affect access to PHI, as its scope is more limited than is often stated. However, state laws also may limit access, and real difficulty may follow if the PHI is then disclosed or used in a manner that violates laws, including, as examples, the Americans with Disabilities Act or the Family and Medical Leave Act.

Under the "best offense is a the best defense" theory, this situation should not arise, as employment records should be segregated so that records with sensitive, protected information are kept separately with access limited solely to those authorized on a need-to-know basis. To assist record custodians in assuring that access to restricted information is authorized, the governing board or other appropriate entity should adopt policies identifying those with access and, from a very practical sense, thus providing the records custodian with guidance on responding to requests for unauthorized access.

In addition, the municipality should ensure that local officials (including the newly elected official who is intent on "cleaning up the mess that exists in local employment") understand and abide by the policies designed to safeguard protected personal information. That discussion may most effectively occur with legal counsel present.

In the scenario set forth here, the access to the file has occurred and, presumably, the mayor is not authorized to access the file in question. There is not a lot that can be done to "undo" access – the equivalent of a jury instruction to disregard what was in the file may have little practical effect. However, immediate action should be taken to minimize

any adverse effect that may arise from improper access, including action to prevent, if possible, disclosure and use of the information in a manner that may violate applicable law. These actions could include:

- Ensuring that no copies of protected information were made, and, if any were made, that all of them are returned to the file or destroyed.
- Counseling the mayor (and any others involved) about the limits of use and disclosure and the liability that might arise therefrom.
- Providing additional guidance and protection for the records custodian in an effort to prevent a recurrence and also ensuring that the custodian will suffer no adverse employment action (i.e., retaliation) for reporting access to the file or for denying unauthorized access in the future.
- Determining if the employee whose file is involved should be advised and how to deal with any potential ramifications (remembering that the employee likely will learn at some time in some manner that the file was reviewed).

7. "Of course we suspended her; have you even seen what she says in her blogs about the city?"

The intersection of protected employee speech with employer concerns about what an employee says in public is a variable one fraught with difficulties for both employees and employers. Those in private sector employment may find difficulties in addressing employee speech – but those difficulties are not entangled with the veneer and deeper interests of constitutional protections.[7] In the public sector, there may be similar issues concerning employee speech on a state legislative level,[8] but the major factor relating to public employee speech is the applicability of Constitutional protections arising due to the nature of their employers as arms of government.

Starting from the traditional *Pickering-Connick*[9] test and its "progeny," and continuing with the *Garcetti* [10] "official duties" variation and the recent *Quon*[11] ruling on cell phone communications, public employers are not required to ignore employee comments – whether in a letter to the editor or to a co-employee, or on a blog – that have an adverse effect on the workplace.

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[7] Except for state legislation, private sector employers' concerns over employee speech, at least at this time, primarily are subject to issues raised in a union environment covered by the National Labor Relations Act 29 U.S.C. §151, *et seq*., and its protections for communicating with and soliciting co-workers on union activities, working conditions, wages and other work-related matters. Recent decisions, though, suggest that the NLRB will examine employer actions against employees for comments made in blogs or other electronic media.

[8] See comments at note 12.

[9] *Pickering v. Board of Education of Tp. High School Dist. 205*, 391 U.S. 563 (1968); *Connick v. Myers*, 61 U.S. 138 (1983).

[10] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

[11] *City of Ontario, California, et al. v. Quon et al.,* __ U.S. __, 130 S.Ct. 1011 (2009).

Thus, the initial response to statement #7 (after who, what, when, and where) might well be what adverse, measurable effect on the workplace did the blog have. It is simply insufficient for an employer merely to have negative views of an employee blogging. Even if the employer doesn't like what the employee is saying, actionable speech made in a blog requires that there be some discernible negative impact on "the efficiency" of the government's workplace. A notable exception applies if the speech is made as part of an employee's "real" official duties. [Thus, an employer may not escape liability for imposing wrongful discipline for blogging by saying that any employee speech about the workplace or the employer is "official" speech. State and federal circuit court decisions consistently pierce through that characterization.]

The suggested response here is not intended to dismiss employee negative speech as necessarily carrying no consequences. What it does suggest is the need for the employer to carefully dissect the speech not so much with a view toward what is said, but with a view toward the effects of the speech on someone other than a city official or administration like or dislike of the comment.

Only after determining the nature of that effect and analyzing it in terms of the disciplinary policies and practices in the community can a legal advisor begin to assess the propriety of imposing discipline and analyzing whether it is commensurate with the offense.

Though other states may not have enacted similar broader protections for public employees, legal counsel also must seek out possible statutory protections for employee speech. New Hampshire, several years ago, expanded speech protections for state employees to include local government employees who now have shelter from discipline broader than that afforded by the Constitution when it comes to criticizing their employers.[12] All states also have whistleblower protection statutes that similarly may provide a broader protection than the First Amendment. See, also, discussion under statements #2, 5, and 6, *supra*.

8. "You won't believe what I found when I went through his desk!"

As with statement #7, public employers[13] may face barriers to searching employees and their workspaces and personal effects that may not concern private employers.[14] As is

[12] NHRSA chapter 98-E: Public Employee Freedom of Expression. " . . . a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. . . . No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee."

[13] See *O'Connor v. Ortega*, 480 U.S. 709 (1987) with respect to federal constitutional law, and state statutory or common law privacy protections that vary by jurisdiction.

[14] All employers, public and private, though, may be limited in their ability to conduct physical searches and perhaps even electronic searches under such legislation as state wiretap laws or the federal Stored Communications Act (18 U.S.C. § 2701, *et seq*.) – an issue left uncertain to some extent under *Quon, supra*.

the case with the ability to inquire into employee speech, one starting point to examine issues that may arise from this communication would be the existence of personnel policies regarding employee expectations of privacy. Though some private, personal areas of an employee (e.g., purse, clothing) may be categorically "off-limits" absent a search warrant or other basis for a search, components of an employees work station may be less protected from an employer's prying eye.

Other factors that may enter into a determination as to the propriety of a work station search include but are not limited to:

- The reason for the search;
- Past practice in general and with respect to the particular employee;
- The reasonableness of conducting a search with prior notice or with the employee's consent and/or presence;
- The nature and degree of possible misconduct underlying the search;
- The nature of the material sought in the search and the likelihood that it would be unavailable if the search were delayed.

In the scenario as posited by this statement #8, one might surmise that the search was either not a specific one or it uncovered unexpected information. If the statement involved a computer search instead of a desk search, one might expect the search to have uncovered some improper use of the computer such as viewing "adult" sites, playing video games, or disclosing confidential information. With the search being made of a desk instead of a computer, the nature of the material/information discovered may be different, but the ability to use it, along with exposure to liability for, e.g., invasion of privacy, will lie in examination of the issues and facts identified in the bullet points above.

9. "Luckily, I have a good friend at the cell phone company who was able to get me some information on that call he made!"

Unfortunately, wishing that you never received this call won't help the matter. At a minimum, the caller should be advised about using the fruits of a forbidden tree. If there were true and legitimate concerns about an employee's use of an employer-provided cell phone, there may be existing proper ways to obtain information about the call – particularly and perhaps conditionally upon the employer having an electronic communications policy that strictly limits employee expectations of privacy.

This scenario, though, posits a warrantless search of cell phone records, albeit one conducted informally with the help of a non-municipal, non-law-enforcement searcher. When it comes to the propriety of obtaining the information in this manner and the ability

to use that information in a disciplinary proceeding, the local government may face difficulty and may encounter charges leading to civil or even criminal recourse.[15]

10. "I told the interview board members not to ask that question, but they apparently did not listen."

It does not take much imagination to guess the type of question that was asked in this situation. The member of the interview board may proclaim innocence of discriminatory intent – "I just wanted to make sure she wouldn't be taking a lengthy maternity leave or, even worse, resigning like Jane did after we spent all that time and money training her."

One "remedy" might be to hire the person who was asked the offending question. That might not be the appropriate decision based on other, non-discriminatory criteria. There may be little that can be done to "undo" the effect and impact of the statement, at least in terms of appearance. Yet, if a decision is made to select another candidate for hiring, the record should demonstrate clear and convincing evidence that the criterion addressed in the improper question was not a factor in the decision. The use of objective examinations may assist in that effort, at least to some extent.[16]

From a preventive perspective, a local government attorney might find the following suggestions helpful:

- ✓ Participate in the selection of interview board members – or at least provide guidelines for the criteria used to select them;
- ✓ Provide, at a minimum, a matrix of permissible and impermissible areas of inquiry, including a list of topics that are absolutely to be avoided;[17]
- ✓ Meet with the members of the interview board to emphasize the importance and non-trivial nature of improper areas of inquiry;
- ✓ When appropriate, scripts may be used for particular inquiries with ad hoc or follow-up inquiries made by or through only designated individuals;[18] and
- ✓ Rehearse with the interview board using responses that might trigger improper follow-up inquiry.

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[15] Though raised at some points during the litigation, the issue of violation of law including the Stored Communications Act, *supra* n. 14, was not fully resolved in the Supreme Court opinions in *Quon, supra,* n.11.

[16] The experiences of municipalities like New Haven, CT, with the use of supposedly objective examinations, indicate the need to examine the examinations that are used. See, e.g., *Ricci v. DeStefano*, __ U.S. __, 129 S. Ct. 2658, 2671, 174 L. Ed. 2d 490 (2009).

[17] While federal equal employment laws may be a primary focus, state laws may contain additional criteria that may form the basis for discrimination in employment.

[18] Scripted interviews alone necessarily may miss opportunities to obtain useful information. That loss must be balanced against the liabilities that may exist for free-range questioning by "inquiring minds wanting to know."